Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 78-1778

LORENZO MOORE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lorenzo Moore, by and through his attorney, NEIL H. FINK, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction for violation of 21 USC §841(a) (1), filed March 27, 1979.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed January 5, 1979, remanding the cause, is reprinted in full herein as Appendix A to this Petition. The Order filed March 27, 1979, affirming Petitioner's conviction, is reprinted in full as Appendix B hereto. Neither of these Orders has as yet been published.

JURISDICTION

The Orders appealed from were filed January 5, 1979 and March 27, 1979. The jurisdiction of this Court is invoked under 28 USC §1254.

QUESTION PRESENTED

Did the trial court erroneously refuse to compel disclosure of a confidential informant who was in the position to give testimony relevant to Petitioner's guilt or innocence?

STATUTE INVOLVED

The Statute under which Petitioner was convicted, 21 USC §841 (a) (1) provides, in pertinent part, as follows:

> It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance.

STATEMENT OF THE CASE

On September 15, 1977, at approximately 5:30 p.m., Special Agents of the Drug Enforcement Administration executed a Search Warrant for a safe located in the office of Lorenzo Moore, Petitioner herein, at his establishment known as Lorenzo's Cocktail Lounge. Inside the safe, the agents discovered an old brown paper bag, within which were four baggies containing a total of 95.17 grams of heroin and a white envelope containing one baggie with 22.97 grams of heroin. The heroin, weighing a total of 118.14 grams was thereupon seized along with some valuables belonging to Petitioner.

The Petitioner, who was not present at the time of the seizure, was subsequently arrested and charged in a one count superseding indictment with knowingly and intentionally possessing with intent to distribute approximately 118.14 grams of heroin in violation of 21 USC §841 (a) (1).

The Search Warrant, which led to the discovery of said heroin, had been obtained by one of the Drug Enforcement Administration Special Agents earlier that day and was premised upon information supplied by a confidential informant.

Included were the following allegations as set out in the Affidavit:

> On September 15, 1977, a confidential informant of the Drug Enforcement Administration advised that in the last 48 hours the informant observed in the safe, as described above, within the premises approximately 5 pounds of heroin at 4444 Joy Road, Detroit, Michigan. (Lorenzo's Cocktail Lounge)

> On September 15, 1977 the aforesaid confidential informant advised the affiant that the informant has observed on numerous occasions various quantities of heroin, cocaine and marijuana in the safe, as described above, on the premises located at 4444 Joy Road, Detroit, Michigan, and has also observed numerous narcotic transactions occur at this location. (Said address is a one-story business establishment).
>
> On the aforesaid date, the confidential informant also indicated that the individual who deals in narcotics at 4444 Joy Road location is known to the informant as LORENZO MOORE . . .
>
> The aforesaid confidential informant has a history of proven reliability having provided information concerning narcotic traffic in the greater Detroit metropolitan area on at least 50 occasions to the affiant.

Based on the information contained in the Affidavit, Petitioner sought to interview the informant as to other information he had relating to the presence of heroin in the safe which could be helpful to his defense. Upon learning that the Government did not intend to use this informant as a witness at trial, the Petitioner duly filed a Motion for Production of and Disclosure of Identity of Informant.

Following a pretrial hearing on said motion, the Court refused to order disclosure of the informant's identity or to make any attempt to discover what relevant information he possessed.

The Petitioner went to trial before the Honorable Ralph B. Guy, Jr. and a jury on May 2, 1978. The informant was not called as a witness by the Government.

The two Special Agents who made the seizure testified to the presence of heroin in the safe. Although there was conflicting testimony as to its exact location in relation to a locked compartment within the safe, it was established that a total of 118.14 grams of heroin was found in a safe located in Lorenzo Moore's office.

The only additional evidence connecting Petitioner and the heroin was the presence of one of his fingerprints on the old brown paper bag containing the baggies of heroin.[1]

Since there was no evidence of the Petitioner's presence at the time the heroin was seized or of his actual possession of the substance at any time, the Government's case rested entirely upon a constructive possession theory.

Intent to distribute was established through a Drug Enforcement Administration Agent's testimony that such a quantity of heroin would not be possessed for an individual's personal use.

The defense consisted of challenging the element of knowledge on the part of the Petitioner as to the presence of the heroin in the safe. Testimony presented by the Petitioner established that six of his employees had the combination to the safe and keys to the locked compartment where the heroin was found and were able to go in and out of the safe freely during Mr. Moore's frequent absences from the bar.

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[1] The inner baggies were not submitted for fingerprints although the Government's state police fingerprint expert admitted that they were a better substance from which to obtain prints.

The Petitioner further testified to his practice of using and reusing brown paper bags, such as the one in which the heroin was discovered, to transport change. It was, therefore, quite possible that he had indeed touched this bag, and left the fingerprints while using it to transport change, sometime prior to the placement of heroin in it. Furthermore, even if he had seen such a brown bag in the safe, it would not have aroused his suspicions since there were many similar bags containing change and receipts.

It was the theory of the defense that any of the people with access to the safe could have caused the heroin to be placed there without the knowledge of the Petitioner and that the presence of Petitioner's fingerprint on the bag did not connect him with the heroin but only with the brown paper bag at some point in time.

At the close of all the evidence, defense counsel moved timely under Rule 29(a) for a Judgment of Acquittal. The trial court reserved decision on the motion pursuant to Rule 29(b) and submitted the case to the jury. A verdict of guilty was returned by the jury and the Motion for a Judgment of Acquittal was subsequently denied by the trial judge.

On June 19, 1978, the Petitioner was sentenced to a five year term of incarceration pursuant to the provisions of 18 USC §4204 (b) (2) followed by a three year special parole term.

The Petitioner appealed his conviction and sentence to the Sixth Circuit Court of Appeals as a matter of right. On January 5, 1979, a panel of that Court remanded this cause to the trial judge with orders that he conduct an *in camera* hearing to determine whether

disclosure of the informer's identity would have been relevant and helpful to the defense and whether the informer was available as a witness. The Sixth Circuit retained jurisdiction of the appeal pending receipt of the trial judge's findings along with a sealed transcript of the *in camera* proceedings On March 27, 1979, the Petitioner's conviction was affirmed by the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with decisions of this Court, and with other Circuit Courts of Appeals and improperly validated the trial court's clearly improper standards for determining relevance and helpfulness to the defense, and the Court of Appeals' validation thereof, bespeaks a need for guidance from this Court in determining whether a confidential informant should be disclosed.

In determining whether disclosure of an informant should be required in a given situation, there are always competing interests to be considered. In *Roviaro v United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957), this Court clearly took note of the purpose and importance of the informer's privilege but went on to weigh it against the defendant's right to a fair trial as follows:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. 353 US at 60-61.

This "relevant and helpful" standard has been applied to include not only informants who were active participants in an incident, see *e.g. United States v Barnes*, 486 F2d 776 (5th Cir 1973), *Lopez-Hernandez v United States*, 394 F2d 820 (9th Cir 1968), but further to a witness who might be able to shed some light on the circumstances and support a possible defense theory, *United States v Freund*, 525 F2d 873, *cert denied*, 486 US 978 (5th Cir 1976), *Gilmore v United States*, 256 F2d 565 (5th Cir 1958), *Lloyd v United States*, 400 F2d 414 (6th Cir 1968).

In the case at bar, the undisclosed informant was clearly in a position to "throw light" on the crucial issue of who had possession of the heroin discovered in the Petitioner's safe. Since the Petitioner had asserted a defense theory of lack of knowledge of the presence of the substance and since there was evidence that other people had access to the safe, any information concerning the circumstances surrounding the presence of the heroin would have been not only "relevant and helpful" to the defense but may have been exculpatory as well. It is therefore asserted that there was not only the required necessity, but indeed a duty incumbent upon the Government to disclose any informant with such evidence to the Petitioner.

A close examination of the facts and the theory of the defense in this context is called for. The only knowledge the Petitioner has of the informant or his information is that furnished on the face of the Affidavit. Thus he must base his showing of the materiality of this informant solely on the existence or absence of allegations in the Affidavit along with the inferences that can be consistently drawn thereupon.

Clearly, since this informant had alleged to have seen heroin in the safe within the past 48 hours, it could reasonably be inferred that this was the same heroin which was later seized. At the very least, the informant would have been able to testify as to who was present to open the safe and let him see the heroin. It seems unlikely that said informant was an employee of the Petitioner who would have had access to the safe himself for a legitimate purpose and who thus could have been alone. In light of the allegations that he has "provided information concerning narcotic traffic in the greater Detroit Metro area on at least 50 occasions to the affiant," it is reasonable to infer that the informant was present in same manner connected with the narcotics.

The fact that another person was present to show the informant the heroin is not only relevant but, assuming such person was not Lorenzo Moore, was exculpatory evidence since it put someone other than the Petitioner in knowing possession of the heroin.

Such an assumption is indeed the obvious one to be drawn from such Affidavit. It was, and is, the theory of the defense that if Lorenzo Moore was indeed present or was ever observed in actual possession of the heroin, such information would have been set out specifically in the Affidavit. The absence of any such allegations therefore evidences the informant's failure to observe Petitioner in the presence or possession of the substance. In addition, the allegation in the Affidavit that said informant was observed "on numerous occasions with various quantities of heroin, cocaine and marijuana in the safe" and has also observed "numerous narcotic transactions" without any mention of Lorenzo Moore's presence around or actual

possession of any of these substances or participation at any time reinforces the substantial doubt as to whether the Petitioner was, in fact, the person responsible for placing the heroin in the safe on September 15, 1977 or any other time, and whether he was ever aware of the presence of said heroin in the safe and thus ever had knowing and intentional possession of the substance. The informant's mere allegation that the individual dealing in narcotics at the location "is known to the informant as Lorenzo Moore" again makes no reference to actually observing the Petitioner in connection with narcotics, and is weak in comparison to the informant's actual observation of the heroin and other controlled substances and narcotics transactions. This plausible possibility that the Petitioner was not present at any time that the controlled substance was observed by the informant is, even without the presence of another person, important exculpatory evidence that only the informant could have provided. Such testimony, if brought out at trial, could have weighed heavily in the minds of the jury.

In *Lloyd, supra*, the Sixth Circuit Court of Appeals took note of this point in assessing the possible relevance and helpfulness of an undisclosed informant:

> His testimony and demeanor on the witness stand could have been helpful to the jury in making a determination whether defendant's story was true. 400 F2d *supra* at 416.

The analogy between the facts in *Lloyd* and those now at bar is unmistakable. There the defendant, accused of possession and selling heroin, asserted as her defense that although she may have delivered the packages in question to the informant, she was unaware of their contents. The Petitioner herein is also

relying on a defense of lack of knowledge of the presence of the substance, and the informant he seeks to disclose was in a position to "throw light" on the theory he advanced.

The type of inferences that the Petitioner herein has drawn in establishing his theory are clearly recognized and accepted by the Sixth Circuit in citing the following language from *Gilmore v United States*, 256 F2d 565 at 567 (5th Cir 1958):

> In this testimony there might have been seeds of innocence, of substantial doubt, or overwhelming corroboration. As the inferences from it covered the full spectrum from innocence to guilt, the process of truth-finding, which should be the aim of every trial, compelled its disclosure. *Lloyd v United States*, 400 F2d *supra* at 416.

Thus the Petitioner's request for disclosure rested firmly on his right to a fair trial which, as recognized in *Roviaro*, requires disclosure of an informant who is "relevant and helpful to the defense of an accused or is essential to a fair determination of the cause."

In such cases the informer's privilege gives way. But it must be remembered that the *Roviaro* decision carries with it a balancing test that requires a weighing of the interests on both sides under each specific set of circumstances.

The Supreme Court's actual language has been cited and followed in virtually every case dealing with disclosure in the past twenty (20) years:

> We believe that no fixed rules with respect to disclosure is justifiable. The problem is one that

> calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible significance of the informer's testimony and other relevant factors. 353 U.S. at 62.

It is worth noting that in the case at bar the Government failed to set forth any competing factors whatsoever to balance against the Petitioner's established necessity for disclosure of this informant. The Government's opposition to disclosure was premised on the informer's privilege in only its most abstract terms dealing with its purpose in protecting the public interest in law enforcement. Not even an assertion of possible danger to the informant if his identity were revealed was advanced by the Government in this case.

In determining the materiality of this informant's evidence, the Government was again of little help. In an attempt to circumvent the question and dispose of it neatly under *McCray v Illinois*, 386 US 300, 18 L.Ed.2d 262, 87 S Ct 1056 (1967), the Court misconstrued Petitioner's theory as a mere attack on probable cause for the Search Warrant. The law is clear that as a rule, courts will not require disclosure of an informant whose only connection with the case was the fact that he supplied probable cause for the search. The Petitioner recognizes the weight of authority on this principle and

does not dispute it in this petition.[1] Rather, the Petitioner asserts that this motion was never premised upon an attack of the validity of the Search Warrant, but rather on the fact that the informant had information relating to his guilt or innocence.

It is still the contention of the Petitioner that the informant, inferentially by his own allegations, demonstrated that he had evidence favorable to the Petitioner and failure to disclose such evidence upon request is a clear violation of his constitutional right of due process. The constitutional standard implicit in this issue seemed to have been established by this Court in *Roviaro* through use of the phrase the "fundamental requirements of fairness" as a limitation on the informer privilege.[2]

The constitutional issue involved in this area was further recognized in *Hawkins v Robinson*, 367 F Supp 1025 (1973), where the District Court issued a Writ of Habeas Corpus holding the issue of whether a defendant was entitled to a disclosure of a Government informant involved the constitutional considerations of a fair trial and found denial of disclosure there a violation of due process.

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[1] It is, however, worth pointing out that authority to the contrary does exist. *United States v Freund*, 525 F2d 873 (5th Cir 1976), *see e.g. United States v Anderson*, 509 F2d 724 (9th Cir 1975); *United States v Hurse*, 453 F2d 128 (8th Cir 1971) *cert denied*, 414 U.S. 908, 94 S.Ct. 245, 38 L Ed 146 (1973).

[2] As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. *Lisenba v California*, 314 U.S. 219, 62 S.Ct. 280, 86 LEd 166 (1941).

The importance of such rights cannot be overstated:

> It is beyond peradventure that the right to a trial in which the 'fundamental requirements of fairness' are secured is a right essential to, and at the very heart of, the protections guaranteed by our Constitution. *Id* at 1034.

Furthermore, in the words of Justice Traynor:

> A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 224, 242 (1964).

Again, in the case at bar, the importance of the evidence that only the undisclosed informant could furnish went far beyond mere "helpfulness" and into the special class of exculpatory material which the Government had an affirmative duty to turn over. *Brady v Maryland*, 373 U.S. 83, 83 S Ct 1194, 10 L.Ed.2d 215 (1963), *United States v DeVoe*, 489 F2d 158 (5th Cir 1974). This disclosure of the informant was not only relevant to the Petitioner's case, but was required as a matter of due process.

The possibility of exculpatory evidence and the incumbent duty on the United States Attorney to turn it over was indeed recognized and considered by the Court in the oral hearing on Petitioner's motion. Unfortunately, in applying an unprecedented narrow interpretation as to the types of evidence *Brady* encompasses, along with allowing unlimited and unquestioned discretion of the Prosecutor in making this determination, it is the Petitioner's contention that the District Court eliminated rather than protected his due process rights recognized in *Brady*.

The following discourse between defense counsel and the Court concerning the relevance of possible testimony of the informant to the defense is illustrative:

> DEFENSE COUNSEL: . . . I believe the juries have to be hit over the head, and I think that without testimony of someone who can say, hey, every time I was there and saw the stuff, this guy was nowhere around, and I think it's a proper inference to be drawn from the affidavit because it's not in there. If that informant was in fact with somebody else when that safe was opened, I think it's a strong inference that it's that somebody else that was involved with the heroin in the safe and not the defendant. And it goes to rebut any inference that the Government wants the jury to conclude as to constructive knowledge of the presence of the controlled substance in the safe.
>
> THE COURT: My point is this: If I interviewed this informant in camera and he told me he never saw your client there, that is not, in my opinion, exculpatory and I wouldn't feel that you had any right to that information or to know the identity of the informant on that basis.

Clearly, in making such a determination, the Court has disregarded the fundamental rule in applying the *Brady* duty that, "the Government and the Courts are obliged to resolve any doubts as to the exculpatory nature of items in favor of the defendant." *United States v Perkins*, 383 F Supp 922 at 931 (1974), citing *United States v Hauff*, 473 F2d 1350 (7th Cir 1973) *cert denied*, 412 US 907.

There can be little doubt that evidence that the Petitioner had never been present at the safe when the informant observed controlled substances could have been very significant in the minds of the jury. Such information, while not exculpatory in the strictest sense of inculpating another person, is, at the very least, "favorable to the accused" which is the actual language of *Brady*, and certainly is "relevant and helpful to the defense" meeting the *Roviaro* standard for disclosure.

It should further be noted that in *Brady v Maryland, supra*, the duty imposed on the Government was applied to encompass a wide range of information, extending beyond evidence relevant to guilt or innocence to include anything material to punishment as well. Thus the limited and strict criteria applied by the District Court herein in determining *Brady* material is in direct conflict with the obvious intent of the Supreme Court's holding.

The Court's refusal to turn over any evidence of the Petitioner's lack of presence (if such evidence did exist) was not only a serious abuse of judicial discretion but a clear violation of the Due Process Clause of the 5th Amendment.

Indeed, the Petitioner submits, such a narrow holding by the Court undermines the broad concepts of fundamental fairness upon which our criminal justice system is dependent.

> Ordinarily it is disclosure, rather than suppression, that promotes the proper administration of criminal justice. *See Dennis v United States*, 384 US 855, 870, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); *United States v Youngblood*, 379 F2d 365 (2d Cir 1967); *United States v Baum*, 482 F2d 1325 (1973).

The trial judge's narrow interpretation of *Brady*, along with his limited perspective of what information is relevant and helpful to the defense under *Roviaro*, is also of significance in considering the Trial Court's handling of the *in camera* hearing on remand. The Sixth Circuit Court of Appeals, in its Order of January 5, 1979, held that the trial judge had abused his discretion in failing to hold an *in camera* hearing prior to ruling on Petitioner's motion, noting that such hearing was necessary for the Court to perform the balancing test required by *Roviaro*. Defense Counsel was not permitted to attend said *in camera* proceedings and hence cannot offer any intelligent comments on the sufficiency of the procedure and the possible helpfulness of the information elicited. Further, counsel is unaware of whether the informant was himself ever interviewed by the judge or whether his findings were based solely on information provided by the agent or agents who had contacts with him. However, in light of what information is available to Petitioner and keeping in mind the attitude the trial judge had already demonstrated at the pretrial hearing, the Petitioner is compelled to question the sufficiency or usefulness of such *in camera* proceedings by the trial judge at this point in time.

Again, Petitioner's claim of relevance is premised on the well supported inferences in the affidavit that Petitioner was not present at the time the informant alleges to have seen five pounds of heroin and other controlled substances in the safe, and further that someone else must have been present to have opened the safe to have shown the substance to the informant. The trial judge had already expressed his opinion that even if he determined through an *in camera* interview that the informant never saw Petitioner present at the times he observed the substances in the safe, the defense would not be entitled to such information.

The Sixth Circuit's order of March 27, 1979, affirming the conviction upheld the trial judge's *in camera* finding that the informant's identity was not sufficiently relevant or helpful to the defense to justify disclosure under *Roviaro*. In reaching such decision, the Court of Appeals noted that "the informant was not even present at the time of the actual seizure by the agents of the drugs in question." This last statement leads Petitioner to question the Court of Appeals' comprehension of Petitioner's theoretical basis for disclosure. Petitioner never asserted the possibility that the informant may or may not have been present at the seizure, and such presence has no significance to Petitioner's argument. Rather the Petitioner asserts (based on the allegations in the affidavit) that the informant was present to observe five pounds of heroin within 48 hours prior to securing the search warrant. The significant information that the informant could have supplied was whether the Petitioner was present when the heroin was observed and, if not, who was present to open the safe and show the informant the heroin.

Petitioner is aware of the line of authority recognizing the propriety of using *in camera* hearings to determine and balance the competing interests surrounding the disclosure of a confidential informant. However, in the situation at bar such a hearing conducted by a trial judge who has already denied a request for disclosure and further stated his opinion that the information sought, even if it existed, was irrelevant, is little more than an exercise in futility.

The Petitioner therefore asserts that only he and his attorney could fully and properly evaluate the information of the confidential informant in relation to the defense. The propriety of allowing the defendant

to make this determination was recognized by the Supreme Court in *Roviaro, supra:*

> The desirability of calling John Doe (informant) as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide. 353 US 864.

Clearly under the circumstances present, where the request for disclosure was premised on a defense theory which the trial judge had already rejected and where the Government has set out no competing interests in opposition to disclosure, there was an obvious need for the defense attorney (under any protective order the Court desired) to have some access to the information of the confidential informant and some input into the determination of its relevance and helpfulness to the defense. This Court should grant certiorari both to rectify the injustice manifested in the instant case, and to establish standards to guide other federal trial judges in making the difficult determination involving disclosure of confidential informants.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the substantial question herein posed.

Respectfully submitted,

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Dated: May 17, 1979

APPENDIX A

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed January 5, 1978)

(No. 78-5318)

United States of America, Plaintiff-Appellee, v. Lorenzo Moore, Defendant-Appellant.

Before: PHILLIPS, Chief Judge;
EDWARDS and ENGEL, Circuit Judges

Following a jury trial, appellant Lorenzo Moore was found guilty upon a superseding indictment charging him with having knowingly, intentionally and unlawfully possessed with intent to distribute approximately 118.14 grams of heroin, contrary to 21 U.S.C. §841(a)(1). The heroin involved was seized following the execution of a warrant for the search of a safe which was located in Lorenzo's Cocktail Lounge in Detroit, Michigan. The affidavit for the search warrant made reference to a confidential informant who had shortly prior to the affidavit informed a special agent of the Drug Enforcement Administration that he had recently observed approximately five pounds of heroin in the safe.

Defendant's counsel filed a timely motion for disclosure of the identity of the informant, agreeing, in connection therewith, to cooperate fully with any protective order which the court might see fit in order to protect said informant if necessary.

It was the claim of defendant that he was unaware of the presence of any heroin in his safe and that he had no reason to believe that the limited number of persons who had lawful access to the safe might have stashed the drugs therein. It was further the logic of the defense that under such circumstances, said informer would have information concerning the unauthorized access of others to the safe which could account for the presence of the heroin or might accord to the defendant a defense of entrapment.

Upon a careful examination of the record, the court is of the opinion that it was an abuse of discretion for the trial judge to have failed, at the least, to hold an *in camera* hearing prior to ruling upon the request and that such a hearing was necessary for the court to perform the balancing test required by *Roviaro v. United States*, 353 U.S. 53 (1957). Accordingly,

The case is remanded to the district court with instructions that the district judge hold an *in camera* hearing to determine whether disclosure of the informer's identity would have been relevant and helpful to the defendant in presenting his defense and whether the informer was available as a witness. The district judge's findings on these questions, together with a sealed transcript of the *in camera* proceedings, will be reported to this court which, in the meanwhile, will retain jurisdiction of the appeal. *United States v. Lloyd*, 400 F.2d 414, 417 (6th Cir. 1968).

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed March 27, 1979)

(No. 78-5318)

United States of America, Plaintiff-Appellee, v. Lorenzo Moore, Defendant-Appellant.

Before: EDWARDS, Chief Judge;
ENGEL, Circuit Judge, and
PHILLIPS, Senior Circuit Judge

Lorenzo Moore has appealed a judgment of the district court finding him guilty of having unlawfully possessed heroin with intent to distribute it, contrary to 21 U.S.C. §841(a)(1). Following oral argument before this court, we remanded the cause to the district court for the purpose of holding an *in camera* hearing to determine whether disclosure of the informant's identity would be relevant and helpful to the defendant in presenting his defense, to determine whether the informant was available as a witness, and finally, to apply the balancing test required by *Roviaro v. United States*, 353 U.S. 53 (1957). This court in the meantime in all other respects retained jurisdiction of the appeal. *United States v. Lloyd*, 400 F.2d 414, 417 (6th Cir. 1968).

Upon remand the district court promptly conducted the required *in camera* hearing and has now certified its findings to this court, accompanied by the sealed transcript of the testimony taken and of the exhibits received.

Upon carefully considering these several documents, the court is of the opinion that the district court fully complied with the requirements of our earlier order of remand, both in form and in substance. The court properly declined to rely solely upon the affidavits submitted, which were essentially conclusory, and examination at the evidentiary hearing was sufficiently probing to satisfy the district court and us that the informant's identity was not sufficiently relevant or helpful to the defendant in presenting his defense to justify its disclosure, employing the balancing test of *Roviaro*. It is apparent from the record that there was nothing to suggest that the protected witness possessed any exculpatory information, the withholding of which would constitute a violation of the rule in *Brady v. Maryland*, 373 U.S. 83 (1963). It is also apparent that the informant was not even present at the time of the actual seizure by the agents of the drugs in question. *Compare United States v. McManus*, 560 F.2d 747, 749, 751 (6th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978). We therefore hold that the government fully discharged its burden to demonstrate that the informant cannot supply information material to the defense. *McManus, supra*, 560 F.2d at 751. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk